IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 613.

SOUTHERN PACIFIC COMPANY, *Petitioner*,

v.

THE UNITED STATES.

ON CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

I.

Opinion of the Court Below.

The opinion of the Court of Claims in this case has not been reported but as required is a part of the record filed herein (R. 5-29).

II.

Jurisdiction.

The judgment of the Court of Claims in this case was rendered on June 6, 1938. A motion for a new trial was filed by plaintiff, your petitioner, on July 19, 1938, and was overruled by order of the Court of Claims entered on No-

vember 14, 1938 (R. 29-30). The petition for writ of certiorari was filed herein on January 24, 1939 (R. 30) and was granted by order of this Court entered on March 6, 1939.

The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925 (Chap. 229, 43 Stat. 936, 939).

III.

Question Presented.

This case involves the right of the Government under the provisions of the Land-Grant Act of July 25, 1866, 14 Stat. 239, Chap. 242, as amended by the Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720, in making settlements for railroad service performed during December, 1931, and January, 1932, to deduct a greater land-grant mileage percentage from charges for the transportation of property of the United States, based on the lawfully published, effective and applicable commercial tariff rates, than represented by the land-grant mileage proportion of the route via which the rate charged were exclusively applicable.

Is the Government entitled to a greater land-grant deduction from charges based on lawfully published, effective and applicable commercial tariff rates than represented by the proportion of the land-grant mileage on the route of railroad via which the low tariff rates charged were exclusively applicable or greater than via which the shipments were transported?

The position of your petitioner is that the respondent is only entitled to the land-grant proportion deduction from charges to the general public or private parties based on commercial tariff rates in effect and applicable via the route which includes the amount of land-grant mileage for which the deduction is made. The Government is not entitled to compute deductions from such commercial charges based on a greater land-grant mileage proportion than exists on the route via which the commercial tariff rates

charged on these unrouted shipments were exclusively applicable. In other words, the Government is not entitled to have a substantial railroad mileage constructed at great cost with private capital and unaided in any way by land grant or other Government assistance converted into land-grant mileage but this is in effect precisely what the judgment of the Court of Claims accomplishes.

The Land-Grant Railroad Case, 15 C. Cls. 126, 139, 142;
Lake Superior & Mississippi R. R. Co. v. *United States*, 93 U. S. 442, 454, 455;
Southern Pacific Company v. *United States*, 237 U. S. 202;
L. & N. R. R. v. *United States*, 273 U. S. 321, 323.

IV.

Statutes Involved.

Although other Acts are cited in the appendix of the brief of the United States in opposition to the petition for a writ of certiorari, the only statutes involved in this case under the Special Findings of Fact and opinion of the Court of Claims are Section 5 of the Act of July 25, 1866, 14 Stat. 239, Chap. 242, and the Amendment by the Act of May 23, 1928, 45 Stat. 722, Chap. 720. These provisions of law are hereinafter set out as Appendix A to this brief. As shown in special findings of fact 7(b), R. 9, for the land-grant mileage on the line of railroad between East Portland, Oregon, and Roseville, California, via the Siskiyou Route, plaintiff, your petitioner, is and was obligated to transport property and troops of the United States for compensation 50 per centum of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service. This Section 5 of the Act of July 25, 1866, as amended by the Act of May 23, 1928, making the line of railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant line,

covers the obligations of your petitioner and the rights of respondent so far as concerns the question here presented. The effect of the Act of May 23, 1928, was as found by the lower Court to make the land-grant mileage on the Siskiyou Route 50 per cent. It is consequently unnecessary to consider the other Acts referred to in this Amendment of May 23, 1928.

The Act of July 1, 1862, 12 Stat. 489, 493, Chap. 120, set out in the appendix at page 13 of the previously mentioned brief of the United States, referring to petitioner's line from San Francisco to Roseville, California, (which was bond-aided, since paid off and not land-grant,) has no materiality whatever in the consideration of the issue presented in this case.

The Act of June 7, 1924, Chap. 291, Title I, 43 Stat. 477, 486, (U. S. C. Title 10, Sec. 1375), referred to at pages 15 and 16 of the appendix to the previously mentioned brief for the United States, is a War Department Appropriations Act. It merely provides for payment of 50 per centum of the full amount of compensation based on tariff rates for transportation of property or troops of the United States over land-grant mileage. The provisions of this Act differ in no way from the Special Finding of Fact of the Court of Claims 7(b), (R. 9). This statute is not involved in this case. The shipments, as shown in Special Finding of Fact 2 (R. 6), were made by the Department of Commerce as well as by the War Department.

V.

Statement of the Case.

This suit was brought in the Court of Claims to obtain a decision on the question of the legal right of the Government, in making settlements with your petitioner, to deduct a greater land-grant mileage percentage from charges for the transportation of property of the United States, based on the lawfully published, effective and applicable commer-

cial tariff rates, than represented by the land-grant mileage proportion of the route via which the rates charged were exclusively applicable.

The transportation of property of the United States by your petitioner Southern Pacific Company, plaintiff below, involved herein was between Portland or East Portland, Oregon, and San Francisco, California (Special Findings of Fact 2, R. 6).

Your petitioner, during the period of the shipments involved in this case, operated and now operates two lines or routes of railroad between Oregon and California points, including Portland and East Portland, Oregon, and San Francisco, California, in part owned by it and in part leased by it from its subsidiary, Central Pacific Railway Company, owner, both of which lines or routes were and are maintained and operated for freight, passenger and all classes of traffic (Special Findings of Fact 5, R. 7).

One of such routes, for convenience called the Siskiyou Route, was completed in December, 1887 (Special Findings of Fact 13, R. 12-13), and the other, for convenience called the Cascade Route, was completed in September, 1926 (Special Findings of Fact 14, R. 13-15), under necessary authority of the Interstate Commerce Commission issued in accordance with paragraph (18) of Section 1 of the Interstate Commerce Act, upon a finding by the Commission that the present and future public convenience and necessity required the construction of this line of railroad (*Finance Docket No. 2873*, 82 I. C. C. 185).

Since the completion of the construction of the lines of railroad constituting the Cascade Route in 1926, your petitioner has had and now has two complete lines of railroad or routes in Oregon and northern California, one the Siskiyou Route, serving the Sacramento and Shasta Valleys in California, and the Willamette, Umqua and Rogue River Valleys in Oregon, producing much tonnage of timber, agricultural products, livestock, etc. (Special Findings of Fact 13(a) and 15, R. 12-13, 15-16), and the other, the Cascade

Route, also serving large timber areas and agricultural and livestock producing areas (Special Findings of Fact 14 and 15, R. 13-15, 15-16).

Your petitioner has maintained the Siskiyou Route transporting a substantial and varied traffic and serving a large and important area. The Siskiyou Route and the Cascade Route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines (First paragraph of Special Findings of Fact 15, R. 15-16).

258.13 miles of the Cascade Route between Portland or East Portland, Oregon, and San Francisco, California, were constructed with the aid of lands granted by Congress, for which land-grant mileage, the Government was and is entitled to have its property or troops transported for compensation 50 per centum of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service (Special Findings of Fact 6 (b), R. 7-8,).

The land-grant deduction proportion of such charges via the Cascade Route was and is 17.801 per cent between Portland, Oregon, and San Francisco, California, and 17.819 per cent between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 6 (c), R. 8).

663.16 miles of the Siskiyou Route between Portland or East Portland, Oregon, and San Francisco, California, were constructed with the aid of lands granted by Congress, for which land-grant mileage, the Government was and is entitled to have its property and troops transported for compensation 50 per cent of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service (Special Findings of Fact 7 (b), R. 9).

The land-grant deduction proportion of such charges via the Siskiyou Route was and is 42.792 per cent between Portland, Oregon, and San Francisco, California, and 42.831

per cent between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 7 (c), R. 9).

On about 75 per cent of the total freight traffic transported by your petitioner on these routes between Oregon and California, the tariff rates are and have been since November, 1931, the same via both the Siskiyou and Cascade Routes, including the rates between Portland or East Portland, Oregon, and San Francisco, California. On approximately 25 per cent of such freight traffic, the lawfully published and effective tariff rates via the Cascade Route have been since November 11, 1931, and are now lower than via the Siskiyou Route (Special Findings of Fact 20, R. 20-21). This was the result of decisions and rulings of the Interstate Commerce Commission, an agency of Congress, in its administration of the Fourth Section of the Interstate Commerce Act as amended by the *Transportation Act of 1920*, Sections 418-421, 41 Stat. 484-488. The Interstate Commerce Commission refused to permit your petitioner to establish and maintain Fourth Section rates between the terminals, Portland or East Portland, Oregon, and San Francisco, California, for application via the Siskiyou Route, sufficiently low to enable it to compete for this 25 per cent water-borne freight traffic of coastwise steamship lines operating between Oregon and California ports (Special Findings of Fact 16, R. 16-19; Special Findings of Fact 17, R. 19, 20; Special Findings of Fact 20, R. 20, 21).

Because of the substantially lower cost of hauling freight over the Cascade line or route than over the Siskiyou line or route, on account of lesser grades, curvatures, operating difficulties and somewhat shorter distance on the Cascade Route, the Commission found that the lower Fourth Section rates to enable obtaining some of this traffic in competition with coastwise steamship lines would be reasonably compensatory under the amended Fourth Section and authorized their establishment and maintenance via the Cascade Route. The Commission, on its own motion, required your petitioner to readjust the rates so there would be no

departures from the long-and-short-haul provision of the Fourth Section via the Siskiyou Route. Your petitioner established rates via the Siskiyou Route between Oregon and California points, including Portland, Oregon, and San Francisco, California, and rates, to, from, and between intermediate points on the Siskiyou Route, which were lower than the rates theretofore found to have been reasonable on the Siskiyou line or route by the Interstate Commerce Commission. These were the rates in effect via the Siskiyou Route during the period of the shipments involved in this case, 1931-1932, between Portland or East Portland, Oregon, and San Francisco, California, and are now maintained by your petitioner via the Siskiyou Route. All as shown more in detail in the Special Findings of Fact of the Court of Claims (Special Findings of Fact, 16, 17, 20, R. 16-19, 20-21). Succinctly stated, the lower Fourth Section terminal rates exclusively applicable via the Cascade Route on the 25 per cent of traffic which was and is water-competitive, were compelled by an Act of respondent's Congress, administered by its authorized agent, the Interstate Commerce Commission. The particular shipments of respondent involved in this case were within the 25 per cent of the traffic on which the rates were lower via the Cascade Route than via the Siskiyou Route (Special Findings of Fact 10, R. 10-11).

In October, 1931, prior to the above-described revision of rates via the Siskiyou and Cascade Routes, effective November 11, 1931, your petitioner gave written notice to the Coordinator of Traffic of the Federal Traffic Board of respondent in Washington, who was in charge of routing Government freight, of the proposed changes in rates via these Routes, the manner in which same would be applied, and advised such Coordinator of Traffic that either the Siskiyou Route or the Cascade Route could and would be used and that your petitioner would respect the Government's routing as to either line. Further, that the Fourth Section terminal rates via the Cascade Route less the land-grant

deduction via that Route that would be available would make a less net charge to the Government than the use of the rates via the Siskiyou Route. Receipt of this communication was acknowledged by the Coordinator of Traffic in October, 1931 (Special Findings of Fact 19, R. 20).

There is no finding by the Court of Claims that your petitioner has ever failed or refused to adequately and satisfactorily transport property of the United States via the Siskiyou Route when requested so to do or that any dissatisfaction with the service afforded via the Siskiyou Route has ever been expressed by any representative of respondent.

The shipments involved in this case were unrouted by the shipper-representatives of respondent as to any particular line or route of your petitioner between East Portland or Portland, Oregon, and San Francisco, California, the points of origin and destination of such shipments (Special Findings of Fact 4, R. 6). In other words, your petitioner was not requested or required to transport these shipments via the Siskiyou Route.

Your petitioner handled and charged for this unrouted traffic in the same manner as it was legally obligated to handle and charge for unrouted traffic of shippers generally. *Brownyard* v. *Union P. R. Co.*, 148 I. C. C. 444, 445, 446. Your petitioner transported such unrouted shipments of respondent over the more economical and less costly operated part of the Cascade Route as compared with the Siskiyou Route and assessed charges against and billed respondent on the basis of the lowest net charges via any route of your petitioner between Portland or East Portland, Oregon, and San Francisco, California, which was on the basis of the lowest lawfully published and effective commercial tariff rates for the transportation of such shipments, restricted to and applicable only via the Cascade Route, less 50 per cent for the land-grant deduction proportions on the Cascade Route of 17.801 per cent for transportation between Portland, Oregon, and San Francisco,

California, and 17.819 per cent for transportation between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 11, 12 (a) and 21, R. 11, 12, 21).

Respondent, through its General Accounting Office, made payments to your petitioner for the transportation of these shipments on the basis of the deduction from the total charges computed by applying the lawfully published and effective commercial tariff rates for like transportation service to the public at large or private parties, restricted to and applicable only via the Cascade Route, between Portland or East Portland, Oregon, and San Francisco, California, 50 per cent for the higher land-grant deduction proportions of 42.792 per cent and 42.831 per cent, on the Siskiyou Route, respectively, applicable to commercial tariff charges to the public at large or private parties for transportation service between such points or terminals, via the Siskiyou Route, via which route such low tariff rates did not apply (Special Findings of Fact 12 (b), R. 12).

Your petitioner accepted such payments under protest and brought suit in the Court of Claims to test the right of respondent to enlarge your petitioner's obligations under the clear and unambiguous provisions of the Land-Grant Act contract and to recover the balance due (Special Findings of Fact 12 (c), R. 12). Its petition was dismissed by the Court of Claims and a review of such judgment has now been granted.

Further discussion of the facts is made hereinafter in the argument.

VI.

Specification of Errors to be Urged.

The Court of Claims erred:

1. In deciding upon its Special Findings of Fact, as a conclusion of law, that your petitioner is not entitled to recover and in dismissing its petition.

2. In not deciding, based upon its Special Findings of Fact, that your petitioner has fully complied with its obli-

gations to the Government on the Siskiyou Route, under the provisions of the Land-Grant Act of July 25, 1866, as amended by the Act of May 23, 1928, and is entitled to recover.

3. In expanding by construction the clear and unambiguous terms of your petitioner's obligations to the Government under the Land-Grant Act contract on the Siskiyou Route.

4. In considering and attaching weight in its opinion in arriving at its judgment, to alleged matters or statements of fact or conclusions which are not mentioned in, are wholly unsupported by and in part conflict with the court's Special Findings of Fact.

VII.

Argument.

It is respectfully submitted that the following warrants a reversal of the judgment of the Court of Claims, with direction that judgment be entered in favor of plaintiff, your petitioner, in the sum of $116.31 (22(a) of Special Findings of Fact, R. 21). A few shipments were selected as typical of all included in the petition in order to shorten the presentation (Special Findings of Fact 3, R. 6).

Although not considered to be material, there will be set out hereinafter as a part of this argument a reply to contentions made in the brief for the United States in opposition to the petition for writ of certiorari, as it is anticipated that such are the only ones available in the present instance.

A.

The Court of Claims Erred in Not Deciding Upon Its Special Findings of Fact that Your Petitioner Has Fully Complied With Its Obligations to the Government Under the Land-Grant Act Contract and is Entitled to Recover.

We leave aside for the present, the question of the erroneous expansion of the clear and unambiguous terms of your petitioner's obligations under the Land-Grant Act contract, and the consideration of matters in the opinion of the lower court, which are unsupported by or in conflict with the court's Special Findings of Fact. Although not expressly so stated, the lower court by necessary implication concluded that your petitioner has breached its Land Grant Act contract with the Government respecting the Siskiyou Route and that this entitled the Government, in making settlements with your petitioner, to the greater Siskiyou Route land-grant mileage deductions from charges based on the low Fourth Section commercial tariff rates on these shipments not applicable via the Siskiyou Route but applicable only to shipments via the Cascade Route which has less land-grant mileage.

This conclusion is arrived at in the opinion of the court without any mention or discussion whatever of the provisions of Section 5 of the Land-Grant Act of July 25, 1866, set out in the appendix hereto, covering the obligations of your petitioner and the rights of respondent.

The reasons stated in the opinion of the Court of Claims appear to be:

(a) That your petitioner has practically abandoned through traffic on the Siskiyou Route (R. 28).

(b) That your petitioner now transports through traffic for the general public on the Cascade Route which, before the completion of the Cascade Route, it transported over the Siskiyou Route (R. 28).

(c) The difference in the rates on 25 per cent of the traffic between the two routes, the court stating that the practical effect of the tariff provisions restricting the application of the lower scale of rates via the Cascade Route is to force shippers, including the United States, to use the Cascade Route except in unusual and rare circumstances (R. 28-29).

(d) That there could be no inducement to a shipper to use the route via the old land-grant-line (the Siskiyou Route), in view of excessive rates and your petitioner's general routing practice in operating its manifests or through train service over the Cascade Route with only local train service scheduled and operated over the Siskiyou Route (R. 29).

In the contract between the parties, being Section 5 of the Act of July 25, 1866, as amended by the Act of May 23, 1928, making the railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant-line, Appendix A, your petitioner's obligations and the corresponding rights of the Government thereunder are clearly set out. Your petitioner is obligated:

(1) To keep said railroad and telegraph in repair and use, and transport the mails thereon and transmit despatches by said telegraph line for the Government, *when required so to do by any department thereof;*

(2) To give the Government preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service;

(3) That said railroad shall be and remain a public highway for the use of the Government of the United States and (as amended by the Act of May 23, 1928) charges for transportation of property or troops of the United States to be 50 per cent less for the land-grant mileage proportion of the route than charges to the general public based on commercial rates for transportation over said railroad;

(4) That property or troops of the United States shall be transported over said railroad (the Siskiyou Route) *when so required by the Government of the United States.*

There is no Finding of Fact in the Special Findings of Fact of the Court of Claims that your petitioner has, in any respect, failed to fully comply with its obligations under this contract. This case involves the transportation of freight and there is no question presented respecting the transportation of troops or the mails upon such railroad or the transmission of despatches by telegraph line, when required so to do by any department of the United States. The contract clearly provides that petitioner shall transport property or troops of the United States over the land-grant Siskiyou Route, *when so required by the Government of the United States.* There is nothing in the Special Findings of Fact of the lower court showing that your petitioner has ever failed or refused to comply satisfactorily with this obligation to transport property or troops of the United States over the Siskiyou Route; *when so required by the Government,* or has failed in any other respect to fulfill its obligations. There is no Finding in the Special Findings of Fact of the lower court that the adequacy of your petitioner's freight train service via the Siskiyou Route has ever been questioned by any representative of the Government or department of the Government having any connection with transportation of freight of the Government or by the accounting officers of the Government. Not only do such Findings not show that your petitioner has ever failed or refused to transport property or troops of the United States adequately and satisfactorily via the Siskiyou Route but there is no Finding that any request or requirement by the Government of the United States in any instances or particular instance has been made that your petitioner do so. *This is the requirement of the contract.*

In the instant case, the shipments in question were unrouted by the Government as to any particular route of your petitioner (Special Findings of Fact 4, R. 6). If the

Government had routed such shipments via the Siskiyou Route, this would have been a requirement, as provided in the contract, that the shipments be so transported by your petitioner. The Special Findings of Fact of the lower court show that your petitioner, complying with its duty under the general law, *Brownyard* v. *Union P. R. Co.*, 148 I. C. C. 444, 445, 446, gave the Government the benefit of the lowest available net charge on each of such shipments between Portland or East Portland, Oregon, and San Francisco, California. These lowest net charges were based upon the applicable commercial lower Fourth Section rates restricted to the Cascade Route, less the appropriate land-grant deductions represented by the land-grant mileage on that route to which such rates were restricted and only applied (Special Findings of Fact 11, 12(a), R. 11, 12).

So far as concerns the reasons stated in the opinion of the Court hereinbefore set out as (a) and (b), that your petitioner has practically abandoned through traffic on the Siskiyou Route and transports through traffic for the general public on the more economical Cascade Route, which it previously transported over the Siskiyou Route, the attention of the Court is called to the clear and unambiguous provisions of this Land-Grant Act contract. Your petitioner is obligated to keep the railroad and telegraph in repair and use and to transport property or troops of the United States thereover when so required by the Government of the United States. It is not obligated to the Government to transport any particular amount of through freight traffic for the general public via the Siskiyou Route and the law does not require it to do so unless the shipper routes such traffic via the Siskiyou Route.

Your petitioner has not abandoned the Siskiyou Route for traffic of any description. The Court of Claims finds in its opinion that the Siskiyou Route has not been abandoned by your petitioner and has been kept in good repair and is open for through transportation between San Francisco and Portland (R. 28). This is fully supported by the

Special Findings of Fact. Special Findings of Fact 5 (R. 7), is that your petitioner has maintained and operated both the Siskiyou and Cascade Lines or Routes for freight, passenger and all classes of traffic. Through traffic is a class of traffic. Special Findings of Fact 15 (R. 15-16), is that your petitioner has two complete lines of railroad or routes, one the Siskiyou Route, serving the valleys and areas described, producing much tonnage of timber, agricultural products, livestock, etc., and the other, the Cascade Route, also serving large timber areas and agricultural and livestock producing areas, each of these lines of railroad serving producing areas quite generally at all points. It is also found that your petitioner has maintained the Siskiyou Route, transporting a substantial and varied traffic and serving a large and important area, and it is further found that the Siskiyou Route and the Cascade Route are two separate routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines.

Completion of the construction of the Cascade Route was found by the Interstate Commerce Commission to be required by the present and future public convenience and necessity and such construction was authorized by the Commission under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act in *Finance Docket No. 2873*, 82 I. C. C. 185.

There has been no abandonment in any respect of the Siskiyou Route or any part thereof. This would require authority of the Interstate Commerce Commission under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act requiring a certificate based on the finding that the present or future public convenience and necessity permit of such abandonment, which, in view of the Special Findings of Fact herein, obviously could not be obtained.

Referring to the third reason appearing in the opinion of the lower court, hereinbefore shown as paragraph (c),

respecting the difference in the rates between the two routes on 25 per cent of the traffic (Special Findings of Fact 20, R. 20-21). Your petitioner has not forced shippers, including the United States, to use the Cascade Route. Your petitioner sought but was not permitted to establish rates via the Siskiyou Route sufficiently low to enable it to participate in the traffic susceptible of water transportation by coastwise lines, via the Siskiyou Route. Shippers would not ship via the Siskiyou Route at the minimum rates authorized by the Interstate Commerce Commission. The lower Fourth Section terminal rates were authorized by the Interstate Commerce Commission for application via the Cascade Route because of the lower cost of operation via that route (Special Findings of Fact, 16, 17, 20, R. 16-19, 19-20, 20-21). Manifestly it cannot be held that your petitioner has breached its Land-Grant contract with the Government by not establishing rates sufficiently low via the Siskiyou Route to obtain traffic from shippers for transportation via this route in competition with coastwise steamship lines when the laws of respondent, the United States, the other party to the contract, prevented it from so doing as shown in the Special Findings of Fact referred to. This difference in rates between the two routes resulted from decisions of the Interstate Commerce Commission in the administration of the *Fourth Section* of the *Interstate Commerce Act* as amended by the *Transportation Act of 1920*, Secs. 418-421, 41 Stat. 484-488, interpreted by the Interstate Commerce Commission in *Transcontinental Cases of 1922*, 74 I. C. C. 48, 70, 71. The Transportation Act evinced an enlarged and different policy upon the part of Congress. In passing upon the reasonableness and lawfulness of rates for the future, the Interstate Commerce Commission speaks as the Legislature and its pronouncement has the force of a statute. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 385, 386.

The fourth reason in the opinion of the Court (d) is that there could be no inducement to a shipper to use the route

via the old land-grant line (the Siskiyou Route) in view of the excessive rates and your petitioner's general routing practice in operating its manifests or through train service over the Cascade Route with only local train service scheduled and operated over the Siskiyou Route. This reference to excessive rates, as will hereinafter be pointed out, directly conflicts with the Court's Special Findings of Fact.

Respecting train service under the Special Findings of Fact of the Court that the Siskiyou Route is maintained and operated by your petitioner for freight, passenger and all classes of traffic, the lower court stating in its opinion that your petitioner has not abandoned the Siskiyou Route but has kept same in good repair and open for through traffic, it is immaterial what the comparative train service may have been at the time of these shipments. These shipments, as shown, were unrouted by the Government. There is no Finding that the Government requested your petitioner to transport these shipments via the Siskiyou Route, which is the provision of the Land-Grant contract, and there is no Finding that your petitioner has ever failed or refused to provide adequate and satisfactory train service on the Siskiyou Route for the Government or for any shipper routing shipments or requesting service via this route. The Interstate Commerce Commission has jurisdiction under the provisions of the *Interstate Commerce Act*, 41 Stat. 476, to require adequate and satisfactory train service via any route upon the complaint of shippers, including the Government. *Johannesburg Mfg. Co.* v. *Michigan Central R. Co.*, 151 I. C. C. 61.

As to the inducement to a shipper to use the route, referred to in the Court's opinion, it is submitted that on the 25 per cent of the traffic which is water-competitive your petitioner did its best to induce shippers to use the Siskiyou Route by undertaking to obtain from the Interstate Commerce Commission the necessary authority under the *Fourth Section* of the *Interstate Commerce Act*, as amended

by the *Transportation Act of 1920*, to establish rates sufficiently low over the Siskiyou Route, including the rates between Portland or East Portland, Oregon, and San Francisco, California, to obtain some of this traffic from shippers in competition with coastwise steamship lines for transportation via the Siskiyou Route. The laws of the United States prevented this and there was and is nothing that your petitioner can do to induce shippers to use the Siskiyou Route. Furthermore, as seen from an examination of the clear and unambiguous provisions of the Land-Grant Act contract, such imposes no obligation on your petitioner not to use the more economical and less costly operated Cascade Route for through traffic of the general public when such is not routed via the Siskiyou Route by the shipper. Under the provisions of *Section 15(8)* of the *Interstate Commerce Act* shippers have the right to determine and designate over which line or route their traffic shall be transported and railroads are obligated to observe such routing instructions of the shipper. There is no Finding in the Special Findings of Fact that shippers are not routing their traffic via the Cascade Route and there is no Finding of any demand, request, or reason for any different character of freight train service via the Siskiyou Route than afforded by your petitioner.

Prior to the revision of rates via the Cascade and Siskiyou Routes resulting from the decision of the Interstate Commerce Commission, your petitioner gave written notice to the Government that either the Siskiyou or Cascade Route could and would be used and that your petitioner would respect the Government's routing as to either line (Special Findings of Fact 19, R. 20).

B.

The Court of Claims Erred in Expanding by Construction the Clear and Unambiguous Terms of Your Petitioner's Obligations to the Government Under the Land-Grant Act Contract.

In the opinion of the Court of Claims (R. 26, 27, 29), controlling weight in arriving at its decision is given to what is stated to have been the past administrative method or construction of respondent's accounting officers in making like settlements with land-grant railroads, thus expanding the clear and unambiguous terms of your petitioner's obligations under the Land-Grant Act contract. This is the effect of the judgment although there is no mention of the language of the Land-Grant Act in the opinion of the Court. As will be hereinafter pointed out, there is no mention in the Special Findings of Fact of the court of any method of settlement employed by respondent's accounting officers in the past.

The Provisions of the Statute Are Clear and Unambiguous and the Government is Bound by the Provisions of the Contract Set Out Therein.

The question of the correct measure of damages, if the statutory contract has been breached, aside, the only matter for consideration is whether or not your petitioner has complied with its obligations to the Government under the Land-Grant Act contract. Such obligations are set out in Section 5 of the Act of July 25, 1866, as amended by the Act of May 23, 1928, shown in Appendix A. The clear and unambiguous obligations of your petitioner and the corresponding rights of the Government thereunder have been referred to hereinbefore. The express provisions of the statute constitute the contract between the parties and the Government is bound by the provisions of this contract.

Lake Superior & Miss. R. R. Co. v. *United States*, 93 U. S. 442, l. c. 454-455;

United States v. *Central Pacific R. R. Co.*, 118 U. S. 235, l. c. 238;
Burke v. *S. P. R. R. Co.*, 234 U. S. 669, l. c. 680;
Union Pacific R. R. Co. v. *United States*, 104 U. S. 662, l. c. 664;
United States v. *Northern Pacific Ry. Co.*, 256 U. S. 51, l. c. 64;
United States v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401, l. c. 404.

The Applicable and Well-Established Rule of Law Respecting Statutory Construction is that it is Not Allowable to Interpret What Has No Need of Interpretation. Long Usage is of no Avail Against a Plain Statute.

There is no doubt about the meaning and no ambiguity in the provisions in this land-grant act contract, either respecting the rights of the United States or the obligations of your petitioner thereunder. But irrespective of the fact that the provisions of this land-grant act contract are clear and unambiguous and that there can be no doubt whatever respecting the meaning of any language used therein, the lower court has erroneously held that the provisions of this contract can be and have been changed by the administrative construction of respondent's accounting officers. In addition, such past rulings of respondent's general accounting officers were applied to a different set of facts from those presented in this case as was also the decision of the Circuit Court of Appeals in *United States* v. *Northern Pacific Ry. Co.*, 30 Fed. (2d) 655, 32 Fed. (2d) 698. These are referred to in the brief of the United States and will be discussed hereinafter.

However, irrespective of what facts may have been presented in these other cases, the rule has been so long and consistently established by this Court that the province of construction lies wholly within the domain of ambiguity that reference to only a few of the many decisions will suffice.

In *United States* v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401, 404, this Court held:

> The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a continuing one. It is of great value to the Government and of course correspondingly burdensome to the carriers. *The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction.* (Italics ours.) When considering another question arising under a like provison in a land grant Act, this Court said: "It might be very convenient for the Government to have more rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable." *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442, 454.

In *United States* v. *Missouri Pacific Railroad Company*, 278 U. S. 269, 277, this Court said:

> We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction.

In *Hamilton* v. *Rathbone*, 175 U. S. 414, 421, this settled rule is announced:

> Inded the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity.

See also

United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84;

Caminetti v. *United States*, 242 U. S. 470, 485;
Houghton v. *Payne*, 194 U. S. 88, 89, 100;
United States v. *Graham*, 110 U. S. 219, 221;
Doggett v. *Railroad Company*, 99 U. S. 72, 77, 78.

C.

The Court of Claims Erred in Considering and Attaching Weight in Its Opinion in Arriving at Its Judgment, to Alleged Matters or Statements of Fact or Conclusions Which Are Not Mentioned in, Are Wholly Unsupported by, and in Part Conflict With, the Court's Special Findings of Fact.

The correctness of the judgment of the Court of Claims depends upon its Special Findings of Fact, made a part thereof, without regard to statements of fact, reasoning or conclusions that may be found in its opinion.

In *M. E. Blatt Company, Petitioner,* v. *United States*, Opinion, United States Supreme Court, December 5, 1938, 59 S. Ct. Rep. 186, 189, in reviewing a judgment of the Court of Claims, this Court said:

> Concretely, the question presented is whether, under the lease here involved, one-tenth of what the commissioner and taxpayer call and agree to be "estimated depreciated value," as of the end of the term, was income to petitioner in the first year of the term. *And that question is to be decided upon the lower court's special findings unaffected by any statement of fact, reasoning, or conclusion that may be found in its opinion.* (Italics ours.)

The same ruling is announced in the following decisions:

Stone v. *United States*, 164 U. S. 380, 383;
Crocker v. *United States*, 240 U. S. 74, 78;
Brothers v. *United States*, 250 U. S. 88, 93;
United States v. *Wells* 283 U. S. 102, 120;
United States v. *Esnault-Pelterie*, 299 U. S. 201, 206.

Great weight appears to be given in the opinion of the Court of Claims to the following statements of fact or con-

clusions, which are not mentioned in and are wholly unsupported by the court's Special Findings of Fact.

(a) The past administrative method, practice or construction of respondent's accounting officers in making settlements with land-grant railroads (R. 26, 27, 29).

(b) The stipulations of the parties in *United States* v. *Northern Pacific Railway Company*, 30 F. (2d) 655 (R. 26-27), which, for obvious reasons, would not have been competent had such been offered in evidence in this case. The report of the decision shows that your petitioner was not a party to that case or to such stipulations.

(Even if the alleged past method of settlement of respondent's accounting officers and the stipulations of the parties in the *Northern Pacific* case were competent, had been included in the Findings and could be properly considered, such would be inapplicable here. As shown by the Special Findings of Fact and the Land-Grant contract, there has been no abandonment of any part of the Siskiyou Route and no substitution in whole or in part for the longer aided and original line (The Siskiyou Route). This distinction will be discussed later.

(c) The acquiescence for a like period by land-grant railroads, including your petitioner, in such administrative construction of respondent's accounting officers (R. 26, 27).

(See Comptroller of Treasury decision, April 17, 1888, 3 Dig. 2nd Comp. 299, involving form of accounting for payment of bonds and not a land-grant case, 17 Comp. Dec. 633, 21 Comp. Dec. 238, 24 Comp. Dec. 193, 3 Comp. Gen. 267, 10 Comp. Gen. 552, and 15 Comp. Gen. 614, where the facts presented were different from the facts of this case but where the railroads objected or protested instead of acquiescing as stated in the opinion. That this case is distinguishable on the facts from the basis of these rulings of respondent's accounting officers, relied upon by it to sus-

tain this judgment of the lower court, will be hereinafter shown.)

The following statements of facts or conclusions in the opinion of the Court of Claims, to which great weight appears to be attached, conflict with the court's Special Findings of Fact.

(a) That your petitioner secured or sought authority from the Interstate Commerce Commission to increase the existing rates over the Siskiyou Route (R. 25). The statement conflicts with Special Findings of Fact 16, 17 and 20 (R. 16-19, 19-20, 20-21). Your petitioner sought authority to reduce the rates via the Siskiyou Route under the Fourth Section of the Interstate Commerce Act sufficiently to enable competition with coastwise lines, which the Commission refused to grant.

(b) That the rates established and maintained by your petitioner over the Siskiyou Route were or are excessive rates (fifth line, R. 29). The statement directly conflicts with Special Findings of Fact 17 (R. 19). The rates established and maintained via and on the Siskiyou Route were and are lower than found to be reasonable on that line by the Interstate Commerce Commission. They could not be excessive.

(c) By implication, that your petitioner forced shippers, including the United States, to use the Cascade Route instead of the Siskiyou Route by restricting the application of the lower scale of rates to the Cascade Route (R. 28-29). This has been discussed hereinbefore. The laws of respondent, administered by the Interstate Commerce Commission, prevented the establishment of such rates via the Siskiyou Route and compelled their restriction to the Cascade Route. The statement in the opinion conflicts with Special Findings of Fact, 16, 17 and 20 (R. 16-19, 19-20, 20-21).

D.

The Judgment of the Court of Claims Imposes an Obligation on Your Petitioner and Vests a Right in the Government Not Assumed by Your Petitioner or Conferred Upon the Government Under the Clear and Unambiguous Provisions of the Land-Grant Act Contract, and, if Enforced, Would Deprive Your Petitioner of Its Property Without Due Process of Law in Violation of the Fifth Amendment.

It is respectfully submitted that it has hereinbefore been shown that your petitioner has not breached its Land-Grant Act contract with the Government. The judgment of the Court of Claims that your petitioner is not entitled to recover, if enforced, would vest a right in the Government to make land-grant mileage percentage deductions from charges to the general public based upon lawfully published and effective tariff rates not applicable via such land-grant mileage, to which the Government is not legally entitled under the provisions of such contract. Such judgment, if enforced, would deprive your petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

In *United States* v. *Central Pacific Railroad Company*, 118 U. S. 235, 240, 241, the Supreme Court held:

> There is another view of this controversy which seems to us conclusive. As the contract between the United States and the railroad company contained in the acts of July 1, 1862, and of July 2, 1864, has been interpreted by this court to authorize the retention by the government of compensation for services only on those roads which the United States aided in building, the construction which the appellants seek to put on the second section of the act of May 8, 1878, would not only render that section a breach of faith on the part of the United States, but an invasion of the constitutional rights of the appellee. We are bound, if possible, so to construe the law as to lay it open to neither of these objections. *Broughton* v. *Pensacola*, 93 U. S.

266; *Red Rock* v. *Henry*, 106 U. S. 596; *Hobbs* v. *McLean*, 117 U. S. 567, decided at the present term, and cases there cited; *United States* v. *Coombs*, 12 Pet. 72. The construction contended for by the appellee preserves the good faith of the government, and frees the act from the imputation of impairing rights secured by the Constitution of the United States.

The following is stated in the opinion of the Court in *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, l. c. 64:

> The company accepted the proposal and at enormous cost constructed the road and put the same in operation; and the road was accepted by the President. Thus the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the Government. *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 679-680. The provision relating to indemnity lands was as much a part of the grant and contract as the one relating to land in place, *Payne* v. *Central Pacific Ry. Co.*, 255 U. S. 228; and it is apparent from the granting act and resolution that "it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits." *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387. Such rights are within the protection of the due process of law clause of the Constitution. *Sinking-Fund Cases*, 99 U. S. 700, 718.

In *Boeing Air Transport* v. *Farley*, 75 Fed. (2d) 765, the United States Court of Appeals for the District of Columbia held, l. c. 767:

> If the contracts in question were property, and if the order depriving plaintiffs of their rights without notice or hearing is void, it amounted to the taking of their property without due process. That the contracts were property we think is clearly held in the recent case of Lynch v. United States, 292 U. S. 571, 54 S. Ct. 840, 843, 78 L. Ed. 1434, where Mr. Justice Brandeis, speaking for the court, said: "Valid con-

tracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v. Central Pacific R. Co., 118 U. S. 235, 238, 6 S. Ct. 1038, 30 L. Ed. 173; United States v. Northern Pacific R. Co., 256 U. S. 51, 64, 67, 41 S. Ct. 439, 65 L. Ed. 825. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. * * * 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' Sinking-Fund Cases (Union P. R. Co. v. U. S.), 99 U. S. 700, 719, 25 L. Ed. 496.

E.

Erroneous Contentions of Respondent, Found Also in Substance in the Opinion of the Court of Claims.

The principal contention advanced in respondent's brief in opposition to the petition for writ of certiorari, briefly put, appears to be that certain specified rulings of accounting officers of the Government and a decision of the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Northern Pacific Railway Company*, 30 F. (2d) 655, 32 F. (2d) 698, were based upon facts like the facts presented in this case and constituted legal warrant for the expansion of the clear and unambiguous terms of your petitioner's obligations under the land-grant act contract by the construction of the Court of Claims based thereon. This is erroneous in every particular. Certain other contentions of respondent will be referred to.

The Decision of the Circuit Court of Appeals of the Eighth Circuit in the Northern Pacific Case is Clearly Distinguishable on the Facts. Further, the Circuit Court of Appeals Erred in the Rule Announced Respecting Weight to be Given Administrative Construction Without Qualification Respecting Ambiguity.

The decision of the Circuit Court of Appeals, Eighth Circuit, in the *Northern Pacific Case*, supra, is discussed and quoted from in the opinion of the lower court (R. 26, 27, 28). In the opinion of the lower court in this case (R. 29), it is in substance stated that your petitioner may not deprive the Government of its lawful land-grant deductions by routing the shipments over new segments or cut-offs connecting with the Siskiyou Line, constructed without the aid of land grants, and if your petitioner is permitted to do so, it may continue to construct new segments without the aid of land grants until an entirely new line, constructed without any aid of land grants, parallels the Siskiyou Line from San Francisco to Portland, thus depriving the Government of its entire land-grant deductions for services that should be furnished between San Francisco and Portland over the old route. This is in substance the same as stated by the majority of the Court in the *Northern Pacific Case*, l. c. 659, under the different facts there presented.

Manifestly, if based upon an examination of the clear and unambiguous provisions of this land-grant act contract and the facts of this case, your petitioner has not breached any of its obligations to the Government or violated any of the rights of the Government, under such contract, then it cannot be held, in effect, that judgment for your petitioner in this case would enable it to continue to construct new segments without the aid of land grants paralleling the land-grant route until an entirely new line is constructed, thus depriving the Government of its entire land-grant deductions. Obviously, if a railroad con-

structed an entirely new line without the aid of land grants and discontinued rates and service on the land-grant line, it would not have fulfilled its obligations to the Government under any land-grant act contract similar to the contract presented for consideration in this case, if the Government requested the transportation of its property over the land-grant line and the railroad failed or refused to furnish such transportation. It would, in such event, deprive the Government of its right to land-grant deductions. But there are no such facts presented on the record in this case. Your petitioner has not deprived the Government of any legal right under the contract to land-grant mileage deductions by routing the unrouted shipments in question over the Cascade Line. The Government did not route the traffic or request that it be routed via the Siskiyou Route. This is the requirement of the contract. Clearly, the legal duty and obligation of your petitioner under the facts presented was to give the Government, as a shipper, the benefit of the lowest available net charge between the points of origin and destination. This your petitioner did and as a consequence thereof, the Government obtained transportation of this traffic at less cost than would have been available to the Government had the Interstate Commerce Commission not authorized the low fourth section rates between these terminals for application via the Cascade Route based on the lower cost of operation via the Cascade Route. Instead of anything having occurred to the detriment of the Government by reason of the difference in rates between the Siskiyou and Cascade Routes which resulted from the operation of the laws of the respondent in this case, the Government has been benefitted.

Under the provisions of paragraph (18), Section 1, Part I of the Interstate Commerce Act, a railroad cannot construct an extension of its line of railroad or a new line of railroad, including so-called cut-offs, or acquire or operate any line of railroad, or extension thereof, or engage in

transportation over or by means of such additional or extended line of railroad unless it can obtain from the Interstate Commerce Commission authority to do so and a certificate that the present or future public convenience and necessity require such construction and operation. This is the law of the United States, administered by the Interstate Commerce Commission as an agency of Congress, which Tribunal speaks as the legislature and whose orders have the force and effect of statutes. Such is the decision of this Court in *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railway Company*, supra.

Therefore, it is submitted that an assumption that your petitioner may do something in the future which would constitute a violation of its obligation under the land-grant act contract, has no application to the facts of this case which show no breach of its obligations. Furthermore, your petitioner could not and cannot construct or operate any new line of railroad without being authorized by the Interstate Commerce Commission to do so upon a finding that such is required by public convenience and necessity.

The facts in the *Northern Pacific Case*, agreed to in the stipulations of the parties, may or may not be sufficient to legally show that the railroad in that case had breached its contract with the Government. No effort appears to have been made to obtain a review of this decision. In any event, the decision of the Circuit Court of Appeals apparently is that the railroad had breached its contract. The facts of the *Northern Pacific Case* are clearly distinguishable from the facts presented in this case. It is unnecessary to here repeat what has hereinbefore been said respecting the maintenance and operation of the Siskiyou Route by petitioner with through rates lower than previously prescribed as reasonable by the Interstate Commerce Commission, and your petitioner's notice to the Government that it would give through service to the Government via either the Siskiyou or the Cascade Route. An examination of the opinion of the Court in the *Northern Pacific Case* reveals an entirely different set of facts from those presented here.

In the *Northern Pacific Case*, it was expressly stipulated between the parties that the passenger train service maintained by plaintiff via Brainerd and Meeker was not designed for the accommodation of continuous, through travel from St. Paul to Seattle and was not suitable and adequate for the use of defendant in the transportation of troops from St. Paul to Seattle. It, therefore, appears that the railroad in the *Northern Pacific Case* agreed in the stipulation between the parties that it had discontinued through passenger train service via the land-grant line. It failed to afford this service for the troops of the United States, passengers not turned over to a railroad unrouted. It appears from the stipulation that the contract between the Northern Pacific and the Government provided for safe and speedy transportation of the mails, troops, munitions of war, and public stores over the land-grant line, l. c. 656.

The Court found in the *Northern Pacific Case* that the so-called cut-offs were in no sense additions which, when constructed without Government aid, do not carry land-grant obligations, l. c. 658-9.

The part of your petitioner's Cascade Route between Black Butte and Springfield Junction, via Klamath Falls, is not a mere straightening of the Siskiyou Route but is a substantial addition constructed without Government aid. That this part of the Cascade Route is a substantial addition and not a mere straightening or shortening of the Siskiyou land-grant route, is shown in the Special Findings of Fact of the Court. It is expressly stated in the first paragraph of Finding 15 (R. 15, 16) that the Siskiyou Route and the Cascade Route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines. There is no such showing in the stipulation of facts in the *Northern Pacific Case*. There was some modification of the Court's findings in the *Northern Pacific Case* in its decision denying rehearing, 32 F. (2d) 698. The gist of the decision of the majority of the Court, clearly dis-

tinguishing that case from the facts presented in this case, is stated as follows in its opinion denying rehearing, l. c. 699:

> The decisive facts remain that, as stated in the first paragraph above, as amended, for more than three decades the route from St. Paul to Seattle via Brainerd and Meeker has been accepted by both parties hereto as a route subject in part to land grant deductions; that until the transportation which forms the basis of this suit, these deductions were computed upon a total mileage of 1,962.21 miles, with a land grant mileage of 1,855.67 miles, a ratio of 47.285; that the Little Falls-Staples and Palmer Junction-East Auburn cut-offs constitute a mere straightening or shortening of an established and mutually recognized land grant route of long standing; that, by the construction of these cut-offs and the withdrawal of through trains and fares over the former route, the railroad has, in effect, established a lieu line, and has abandoned that former route for adequate through Government travel.

The Circuit Court of Appeals finds:

(1) That the sections of new line referred to constitute a mere straightening or shortening of an established and mutually recognized land-grant route of long standing;

(2) That the railroad had withdrawn through trains and fares over the land-grant line in question;

(3) That in view of the above, the railroad had, in effect, established a lieu line and had abandoned the former route for adequate through Government travel.

As contrasted with the above findings in the *Northern Pacific Case*, the Special Findings of Fact here show:

(1) That petitioner's line of railroad on the Cascade Route between Black Butte and Springfield Junction, via Klamath Falls, is not a mere straightening or shortening of the Siskiyou land-grant route but constitutes a substantial addition to petitioner's system of railroads. *United*

States v. *Kansas Pac. R. Co.*, 99 U. S. 455; *United States* v. *Central Pac. R. Co.*, 118 U. S. 235. In addition to what is set out in the Special Findings of Fact of the Court, petitioner's Exhibit 23, made a part of Special Finding of Fact 5 (R. 7), shows that this line of railroad is connected up at Klamath Falls with another line of railroad of petitioner extending to and joining petitioner's transcontinental route on the old Central Pacific Line east of Reno, Nevada;

(2) That petitioner in this case maintains through freight rates via the land-grant Siskiyou Route lower than the rates previously found by the Interstate Commerce Commission to have been reasonable, is obligated under the law to maintain adequate through freight train service via any route to meet requirements, and no question has ever been raised by anyone connected with the Government concerned with shipping freight or settlement of accounts respecting the adequacy or satisfactory nature of such through freight train service; the record does not show that petitioner has ever failed to afford satisfactory service to the Government via the Siskiyou Route, when required by the Government to do so, as provided in the contract. The record does show that your petitioner notified the Government that the Siskiyou Route and the Cascade Route could and would be used and your petitioner would respect the Government's routing as to either line (R. 20).

(3) It follows that petitioner has not established a lieu line and has not abandoned in any respect the Siskiyou Route.

In the above quotation from the second opinion of a majority of the Court in the *Northern Pacific Case*, reference is made to the acceptance by both parties of the route from St. Paul to Seattle, via Brainerd and Meeker, as being subject in part to land-grant deductions. There was no intimation of any ambiguity or uncertainty in the pro-

visions of this Northern Pacific land-grant contract in the opinion of the Court. It is submitted that the decisions of this Court hereinbefore discussed show that where the provisions of a statute or a contract are unambiguous and free from doubt, such consideration is immaterial, and the Court erred in its decision in the *Northern Pacific Case.*

In *Norton Iron Works* v. *Standard Slag Co.*, 13 F. (2d) 622, the Circuit Court of Appeals, Sixth Circuit, held, l. c. 623:

> There are many cases holding that ambiguities arising from the words employed in a contract are removed by practical construction placed upon them by the conduct of the parties. *Toplift* v. *Toplift*, 122 U. S. 121, 7 S. Ct. 1057, 30 L. Ed. 1110; *Indian, etc.*, v. *Bartlesville, etc.* (C. C. A.) 288 F. 273. But this rule is not applicable to contracts that are plain in their terms. Such contracts must be given their proper legal construction; otherwise there would be a denial of the terms, and a contract made for the parties to which they had not agreed. *Lehigh Valley R. Co.* v. *Stewart*, 37 N. J. Law, 53; *Griffin* v. *Coal Co.*, 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115; *Pressed Steel Car Co.* v. *Union Pacific R. Co.* (C. C. A.) 297 F. 788.

In *W. P. Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.*, 82 Fed. (2d) 94, 96, the Circuit Court of Appeals, Sixth Circuit, held that the practical construction of the parties to a contract is not permitted to defeat the clear language of the instrument.

The Circuit Court of Appeals, Eighth Circuit, has many times announced the correct rule of construction.

> *Helvering* v. *St. Louis Southwestern Ry. Co.*, 84 Fed. (2d) 857, l. c. 858, Circuit Court of Appeals, Eighth Circuit. This Court decided the *Northern Pacific Case, supra,* in 1929. This decision in 1936 held that where the provisions of a statute are unambiguous, there is no power to amend it by regulation.

Helvering v. *Northwestern Nat. Bank & Trust Co.*, 89 Fed. (2d) 553, l. c. 556, where the Circuit Court of Appeals, Eighth Circuit, held in 1937 that a plain, unambiguous statute cannot be amended by administrative regulation.

Walker v. *United States*, 83 Fed. (2d) 103, l. c. 106. Here again the Circuit Court of Appeals, Eighth Circuit, in a decision rendered in 1936 subsequent to the *Northern Pacific* decision in 1929, with rather extensive citation of authorities, held that if the statutory meaning is clear, there is no place for rules which aid in ascertaining the meaning of the statute and neither legislative nor executive construction, nor both, is of any aid or force.

Minnesota Tea Co. v. *Commissioner of Internal Revenue*, 76 Fed. (2d) 797, l. c. 799. Here again the Circuit Court of Appeals, Eighth Circuit, in this decision rendered in 1935, held that it is elementary that the first resort, with a view to ascertaining the meaning of a statute, is to the language used and if that is plain, there is an end to construction, and the statute is to be taken to mean what it says.

Johnson v. *Southern Pacific Company*, 117 Fed. 462, l. c. 465. The Circuit Court of Appeals, Eighth Circuit, in this decision rendered in 1902, held that construction and interpretation have no place or office where the terms of a statute are clear and certain, and its meaning is plain; that in such a case they serve only to create doubt and to confuse the judgment and when the language of a statute is unambiguous, and its meaning evident, it must be held to mean what it plainly expresses and no room is left for construction.

Deming v. *McClaughry*, 113 Fed. 639, l.c. 641. The Circuit Court of Appeals, Eighth Circuit, in a decision rendered in 1902 prior to the decision in the *Northern Pacific Case*, held that while the opinions of the officers of the executive departments of the Government may be permitted to lead the way to the proper construction of ambiguous statutes entrusted to them to enforce, yet where the words of the acts are plain, and their meaning is clear, these must prevail.

Webber v. *St. Paul City Ry. Co.*, 97 Fed. 140, l. c. 144-5. The Circuit Court of Appeals, Eighth Circuit, in this decision rendered in 1899, held that there is no safer or better canon of interpretation than that, when the terms of a statute are plain and its meaning is clear, the legislature must be presumed to have meant what it expressed, and there is no room for construction.

If petitioner and railroads generally had acquiesced in this administrative construction or method of settlement with land-grant railroads by respondent's accounting officers, such acquiescence would not change the terms of the land-grant act contract.

Rulings of Respondent's Accounting Officers Distinguished On the Facts Presented. Further, Railroads, Including Petitioner, Have Not Acquiesced.

Although there is no support in the Special Findings of Fact, in the opinion of the lower court an alleged accounting practice in making settlements with land-grant railroads, in cases involving the same or similar questions, is stated to have been consistently and uniformly followed by respondent's accounting officers for more than fifty years starting with the decision of the second Comptroller of the Treasury on April 17, 1888 (R. 26). This stated administrative practice of respondent's accounting officers is used for the expansion of petitioner's land-grant obligations by construction, it being stated that the rule is fortified when the administrative construction has been acquiesced in for a like period by the adverse or opposite party as the land-grant railroads have done in this case. (R. 27) This is also not mentioned in the Special Findings of Fact of the Court. However, the following is an analysis of the rulings of the Comptroller of the Treasury and the Comptroller General, referred to in the brief for the United States previously mentioned, including those referred to in the opinion of the lower court. It is submitted that this analysis of these rulings shows that the facts were different from

the facts presented in this case and that, furthermore, the railroads have not acquiesced. The difference on the facts is that in this case, there has been no abandonment of any part of the Siskiyou Route. The facts of these other cases are hereinafter discussed sufficiently to show that even if legally permissible to change unambiguous contracts by a consideration of administrative construction, such rulings are applicable.

The ruling of the second Comptroller of the Treasury, April 17, 1888, 3 Dig. Dec. 2nd Comp. 299. This decison of the second Comptroller of the Treasury did not involve any question respecting land-grant deductions. The question presented and decided was what proportion of the compensation should be carried to the railroad's credit on the Government books and what proportion paid directly to the railroad. The line of railroad in question was a bond-aided and not a land-grant line. In either case, whether the compensation for transportation was credited to the railroad on the Government books in partial payment of the bonds or whether paid directly to the railroad, the railroad obtained the benefit to the full amount either through partial extinguishment of its obligation on the bonds or payment to it in cash. The facts of the case clearly distinguish it from this land-grant deduction performance in which the railroad receives nothing either by way of credit or cash. The decision was the result of an objection by the railroad to the Government's method of accounting. This decision was erroneous and, it is submitted, conflicts with the decisions of this Court in *United States* v. *Central Pacific Railroad Company*, 118 U. S. 235, and *United States* v. *Kansas Pacific*, 99 U. S. 455.

5 Comp. Dec. 364. This communication from the acting Comptroller of the Treasury to the Secretary of War in 1899 involved a bond-aided road and not the question of land-grant deductions, is similar to the memorandum of the second Comptroller's office, April 17, 1888, and comments hereinbefore made in that connection apply.

17 Comp. Dec. 633. This appears to be the first ruling respecting land-grant railroads. The basis of settlement was protested or questioned by the railroad involved. The communication from the Comptroller of the Treasury to the Secretary of War was under date of February 28, 1911. *The land-grant line between certain points had been discontinued on account of a change in a river bed.* The ruling was that where a railroad company accepts lands granted by the Government to aid in the construction of a railroad, it thereby accepts the conditions of the grant and that the obligation thus incurred by the railroad should not be diminished because of a change of its route or trackage. The facts presented on which this ruling was made are entirely dissimilar to the facts presented in this case. It is shown in the Special Findings of Fact of the lower court and stated in the opinion of the lower court that the land-grant portions of the Siskiyou Route between Springfield Junction and Black Butte, via Ashland, and between Tehama and Roseville, have not been abandoned by the petitioner and have been kept in good repair and are open for through traffic between San Francisco and Portland. This administrative construction, if it could properly be considered in this case, should be viewed in the light of the dissimilar facts presented in the two cases. It has no application to the facts of this case.

21 Comp. Dec. 238. This was a decision by the Comptroller of the Treasury in October, 1914. It arose upon the protest of the Atchison, Topeka & Santa Fe Railway Company or application of this company for a revision of the action of the auditor for the Interior Department in disallowing $4.26 on its claim for transportation of 15,200 pounds of cement from Chanute, Kans., to Holbrook, Ariz. The railroad company claimed for said service a certain net rate on the basis of a certain gross rate, less land-grant deduction via Ottawa and Emporia, Kans., a distance between Chanute and Albuquerque of 915.77 miles with 419.92 land grant. The auditor allowed a lower net rate based on the

same through gross rate less land-grant deduction by Lawrence, Kans., a distance between Chanute and Albuquerque of 947.90 miles, with 511.34 miles land grant. Both routes were wholly operated by the Atchison, Topeka & Santa Fe Railway. The decision contains recitals of land grants unnecessary to here set out. *It is stated in the decision that since the original grant, branch lines have been built, making connections at various points, thereby making new through routes to the abandonment, in part, of the aided through route.* It is stated that the holding of the accounting officers has been that the changing of a line of railroad and abandoning of any part of the original aided line does not deprive the Government of its original rights, and settlement for service over the new line is, therefore, required to be made as if the transportation were over the original line. This administrative construction, whether or not legally correct, has no application to the facts of this case. There has been no abandonment of any part of the land-grant mileage on the Siskiyou Route. It will be noted that the railroad protested such action under the facts there presented.

24 Comp. Dec. 193. This was a decision by the Comptroller of the Treasury in October, 1917. The Missouri Pacific Railway Company had protested or requested a reconsideration of the decision of the Comptroller of the Treasury in May, 1917, revising a settlement in March, 1917, of the Auditor for the State and Other Departments. *The original line was shortened and although not expressly so stated, it appears by inference from the discussion that the land-grant section was abandoned.* The decision shows that the Missouri Pacific Railway Company objected to such method of settlement and requested a reconsideration. It cannot properly be said that this railroad agreed with and acquiesced in such performance.

3 Comp. Gen. 267. This was a decision by the Comptroller General in October, 1923. The Southern Pacific

Company objected and applied for review of a settlement of transportation charges on a shipment of high explosives from Marshall (Spokane), Wash., to Roseburg, Oregon. In its application for review, the company claimed an additional allowance of $83.09, based on the fact that the published rate from Marshall to Portland was only applicable via the Northern Pacific Railway, Pasco, thence Spokane, Portland & Seattle Railway, and that there was no through rate published which applied via the Northern Pacific Railway land-grant line through Tacoma. *The facts were that the Northern Pacific Railway Company had discontinued through rates on the land-grant line in question and published same for application via the newly acquired non-land-grant line between Pasco and Portland, thus substituting said line for its own original aided line.* Whether or not legally correct, the decision in that case was based upon facts dissimilar to those presented in this. Petitioner has a complete line of through freight rates lower than previously prescribed by the Interstate Commerce Commission as reasonable, which it has established and maintains via the Siskiyou Route and has offered to serve the Government via either the Siskiyou Route or the Cascade Route, as requested. It will be noted that the case referred to did not involve any question of land-grant mileage on Southern Pacific Lines but that the Southern Pacific Company, as the collecting carrier, objected to and did not acquiesce in such method of settlement.

10 Comp. Gen. 552. This was a communication from the Comptroller General to the Postmaster General under date of June 23, 1931. The inquiry from the Postmaster General involved the transportation of the mails. The letter from the Postmaster General to the Comptroller General shows that the Missouri Pacific Railroad Company protested the action taken by the Post Office Department. It did not acquiesce in its method of settlement. It is stated in this decision *that the 3.67 miles involved was not over the land-*

grant line but was substituted for mileage over the original land-grant line, which it was held the railroad was not entitled to abandon. There has been no substitution of mileage in this case. The Siskiyou Route remains open. In this communication from the Comptroller General to the Postmaster General in June, 1931, reference is made to the decision of the Circuit Court of Appeals, Eighth Circuit, in *United States* v. *Northern Pacific Railway Company,* supra.

15 Comp. Gen. 614. This was a communication from the Comptroller General to the Spokane, Portland & Seattle Railway Company under date of January 16, 1936. The Railway Company had protested and requested reconsideration of a decision of February 13, 1934, which disallowed a claim for 21 cents for transportation of a shipment from Los Angeles, Cal., to Pasco, Wash., under a bill of lading dated September 2, 1932. This case appears to involve the same set of facts as 3 Comp. Gen. 267 so far as concerns the line of land-grant railroad involved. The decision shows *that through rates had been cancelled via the land-grant route through Tacoma and a new line substituted in lieu of the Northern Pacific land-grant line.* The facts are therefore different from the facts presented in this case. Reference is made in the decision to the *Northern Pacific Case,* supra. It will be noted from this decision that the request for reconsideration involved the sum of 21 cents as appears at pages 614 and 615. The carrier by letter of February 21, 1934, to the Comptroller General, previous to the request for reconsideration of the decision of February 13, 1934, disallowing the claim for 21 cents, stated as follows, l. c. 615:

> As the amounts we are outstanding on these bills are so small, we are accepting your settlement as final and withdraw our claim for additional revenue. We do not, however, accept this as a precedent for any future settlements of like nature and shall insist that rates via No. Pac. Ry. be used in using that line's land

grant. These amounts have been written off our books and our file is hereby closed.

It is clear that this railroad did not acquiesce in this administrative method, practice or construction of respondent's accounting officers.

It is therefore submitted that the lower court erred in holding in its opinion that the decisions of respondent's accounting officer were applicable to the facts of this case; that this method of settlement of accounts with land-grant railroads has been acquiesced in by land-grant railroads generally for fifty years or any other period or inferentially that your petitioner has so acquiesced generally, and in employing such unsubstantiated assumption in fortification of the erroneous rule announced respecting the effect of administrative construction.

Rulings of Respondent's Accounting Officers Contradict Its Contention Here.

In connection with the above discussion respecting rulings of respondent's accounting officers, the attention of the Court is called to the following rulings which would appear to be more applicable to the facts of this case.

As found by the lower court in its opinion (R. 24), and as set out in Special Finding of Fact 4 (R. 6), the shipments involved in this case were unrouted by the shipper-representatives of respondent as to any particular line of railroad or route of your petitioner between East Portland or Portland, Oregon, and San Francisco, California, the points of origin and destination of such shipments. Under such facts, instead of the method of settlement used by respondent's General Accounting Office in this case having been consistently and uniformly followed by respondent's accounting officers for more than fifty years in cases involving the same or similar questions, as stated by the lower court in its opinion (R. 26), the ruling of respondent's accounting officers is that the Government is not entitled to the

greater Siskiyou Route land-grant deductions as seen from the following decisions:

In *Deduction for Land Grant Where the Transportation Request Does Not Indicate The Route*, Vol. 7, Decisions of the Comptroller of the Treasury, 224, in a ruling made in November, 1900, it was held:

> *Where a transportation request does not indicate the route by which the transportation is desired*, a land-grant railroad company which furnishes the transportation via the most usually traveled of two of its routes is not subject to a deduction for land grant computed on the mileage aided on the longer route. (Italics ours.)

In *Transportation Over One of Several Land-Grant Railroads Under the Same Control*, Vol. 8, Decisions of the Comptroller of the Treasury, 474, in a decision rendered in January, 1902, it was held, l. c. 479:

> Where, with Government aid, two separate and independent lines of railroad have been constructed from a common point to entirely different points, but which subsequently by extension and independent connections are projected through a common point, and all these lines have subsequently passed to the control of a single company, and transportation is furnished between such common points for the Government by the most usually traveled of said routes, deduction for land grant should be made on the basis of such route, in the absence of a contract *or a request for transportation by the other route.* (Italics ours.)

Respondent's Contention Respecting Comparative Rates via the Siskiyou and Cascade Routes on the Water-Competitive 25 Per Cent of the Traffic is Clearly Erroneous.

Beginning at page 11 of the brief for the United States in opposition to the petition, the following is stated:

> In its report of July 1930, the Interstate Commerce Commission revoked all existing Fourth Section orders, but it established a new order giving relief

> from the long-and-short-haul provisions between San Francisco and Portland. 165 I. C. C. 373. The order, specifying a minimum clearance over the water rates and minimum earnings per ton-mile and per car-mile, did not assert that the rates authorized were confined to the Cascade route.

The statement is in error. The subject has been discussed hereinbefore, where reference is made to Special Findings of Fact 16, 17 and 20 (R. 16-19, 20-21). These findings show:

In 1920, the Fourth Section of the Interstate Commerce Act was amended by Act of Congress in which it was required that the lower rates between the ports or terminals could not be established or maintained unless shown to the Interstate Commerce Commission to be reasonably compensatory, and in connection with which it was necessary to show that the higher rates at intermediate points were reasonable rates (R. 17).

Following the 1920 amendment to the Fourth Section of the Interstate Commerce Act, the Interstate Commerce Commission reopened all previous Fourth Section authorities which had been granted your petitioner on the Siskiyou Route to meet water competition and set the case down for hearing in 1922, at which time hearings were held but the case was not decided by the Interstate Commerce Commission until 1927 (R. 17, 18). Your petitioner's presentation to the Interstate Commerce Commission in 1922 was based on the cost of operation over the land-grant line via Ashland, Oregon, on the Siskiyou Route (R. 18).

The lower rates between the ports, including Portland, Oregon, and San Francisco, California, which the Interstate Commerce Commission prescribed or permitted as reasonably compensatory in 1927, based on the cost of operation via the Siskiyou Route presented in 1922, were so much higher than the rates of the competing water lines that your petitioner could not share in the business. In other words, the Interstate Commerce Commission refused

to permit the establishment of Fourth Section rates via the Siskiyou Route sufficiently low to enable your petitioner to transport water-competitive traffic via this route in competition with the coastwise water lines (R. 18).

Because of this inability to compete with the water lines, petitioner obtained from the Commission a reopening of this decision rendered in 1927. On the new record made in 1927 and 1928, petitioner, in order to show the reasonably compensatory nature of the lower rates between the terminals, including Portland, Oregon, and San Francisco, California, based its presentation on the transportation conditions and cost of operation on the Cascade line or route, shown in solid blue on petitioner's exhibit 23, between Black Butte, California, and Springfield Juncton, Oregon, which had been completed since the 1922 hearings on the old applications or on September 1, 1926 (R. 18).

The cost of hauling freight over the Cascade line or route between Black Butte, California, and Springfield Junction, is substantially less than the cost of hauling freight over the Siskiyou route between Black Butte, California, and Springfield Junction, Oregon. The Cascade route is 24 miles shorter between these points than the Siskiyou route and substantially reduces the grades, curvatures, and operating difficulties encountered in the haul over the Siskiyou Mountains through Ashland, Medford, Grants Pass, and Roseburg, Oregon, on the Siskiyou route (R. 18).

On the record made in 1927 and 1928 based on transportation conditions existing on the Cascade route referred to, the Interstate Commerce Commission granted petitioner authority to maintain lower rates between the terminals, including Portland, Oregon, and San Francisco, California, than to intermediate points, subject to *certain minimum rates* and minimum differentials over the prevaling water rates *with a provision that computation of the minimum rates which were based on mileage should be made over the operated routes via which the rates were to be applied.* In December 1932, the Interstate Commerce Commission, in

190 I. C. C. 273, modified certain of these minimum rate provisions but *not the requirement that the rates should be based over the line of operation via which the rates applied* (R. 19).

In the report and order of the Interstate Commerce Commission entered in July 1930, 165 I. C. C. 373, all existing Fourth Section orders granted petitioner were cancelled and all existing applications of petitioner denied, which necessitated the cancellation of the lower Fourth Section terminal or port rates which petitioner had theretofore maintained in effect over the land grant line via Ashland, the Siskiyou route. In compliance with this decision of the Commission in 1930, petitioner revised the entire rate structure between California and Oregon to conform with this Fourth Section decision. The Fourth Section rates authorized by the Commission between the terminals or ports, including Portland, Oregon, and San Francisco, California, were applied over the Cascade line or route, effective November 11, 1931 (R. 19).

The rates via the Siskiyou route, including those between Portland, Oregon, and San Francisco, California, were revised effective November 11, 1931, so as to remove prohibited departures from the provisions of the Fourth Section of the Interstate Commerce Act in the rates between the terminals or ports. *Petitioner established rates via the Siskiyou route between Oregon and California points, including Portland, Oregon, and San Francisco, California, and rates to, from, and between intermediate points on the Siskiyou route, which were lower than the rates theretofore found to have been reasonable on that line by the Interstate Commerce Commission.* These were the rates in effect via the Siskiyou route during the period of the shipments involved in this case, 1931-1932, between Portland or East Portland, Oregon, and San Francisco, California, and are now maintained by the petitioner via the Siskiyou route (R. 19, 20).

On approximately 75 per cent of the traffic transported by petitioner on the routes between Oregon and California, the lawfully published and effective tariff rates are, and have been since 1931, the same via both the Siskiyou and Cascade routes, including rates between Portland or East Portland, Oregon, and San Francisco, California. On approximately 25 per cent of such freight traffic, the lawfully published and effective tariff rates via the Cascade route have been since 1931 and are now lower than via the Siskiyou route. *The petitioner sought from the time prior to 1926 to 1931 to secure authority from the Interstate Commerce Commission to put in very low rates between the terminals to compete with the water lines.* A very small percentage of freight traffic of petitioner between Portland or East Portland, Oregon, and San Francisco, California, is Government business. A substantial part of such shipments of respondent moves on rates which are the same via both the Siskiyou and Cascade routes (R. 20, 21).

It is seen from these Special Findings of Fact that your petitioner undertook to obtain from the Interstate Commerce Commission authority which would permit the establishment of rates between the ports or terminals sufficiently low via the Siskiyou Route to enable participation in this water-competitive traffic. The Commission refused to permit this. Your petitioner, being out of the business via any route, again applied to the Interstate Commerce Commission for authority to establish rates sufficiently low to enable participation in water-competitive traffic and based its presentation on the lower cost of operation via the Cascade Route. The Interstate Commerce Commission in substance found that lower rates via the Cascade Route than it would authorize for application via the Siskiyou Route would be reasonably compensatory. The orders in 165 I. C. C. 373, July, 1930, and 190 I. C. C. 273, December, 1932, prescribed certain minimum rates, that is, rates lower than which could not be lawfully established. This was done by specifying minimum earnings per ton-mile and per

car-mile. Both orders required that the rates should be based over the line of operation via which the rates applied. It has already been noted that the Commission refused to authorize these lower rates based on cost of operation via the Siskiyou Route. As seen from the report of the Commission, 165 I. C. C. 373, 382, decided July 10, 1930, the presentation was based on cost of operation via the Cascade Route, as found in the Special Findings of Fact referred to. It is obvious, therefore, that your petitioner could not obtain the required minimum earnings from such Fourth Section rates applied via the substantially more costly operated Siskiyou Route. Respondent is in error in contending that such Fourth Section rates were not confined to the Cascade Route by the Interstate Commerce Commission.

It is also contended by respondent that your petitioner points to nothing to show that the order of the Commission compelled the differential established November 11, 1931. The Special Findings of Fact of the lower court show that the lower Fourth Section rates were granted by the Commission via the Cascade Route and were denied for application via the Siskiyou Route and also show that the rates established by your petitioner via the Siskiyou Route, when the revision was compelled by the Interstate Commerce Commission's denial of all outstanding Fourth Section relief, were lower than the Commission had previously found to be reasonable for application via the Siskiyou Route. The Government as well as any shipper has no right to rates less than reasonable maximum rates. But here your petitioner established rates less than reasonable maximum rates and maintains such rates via the Siskiyou Route. Furthermore, if at any time there is any question respecting the reasonableness of any rate or rates in effect via the Siskiyou Route, the respondent as well as any other shipper has recourse to the Interstate Commerce Commission under the provisions of the Interstate Commerce Act to have an appropriate reduction in such rate or rates ordered.

Certain Decisions Cited by Respondent Have No Application to the Facts of this Case.

In *Southern Pacific Company* v. *United States,* 272 U. S. 445, the railroad had no tariff for the service rendered filed with the Interstate Commerce Commission available to the public at large but had filed a special tariff for the Government, in such cases, without land-grant deductions. It was held that no contract of the United States to pay the special tariff rate could be implied from the fact that the shipments were made when the special tariff was the only one applicable on file, in the absence of proof that the contracting officers then knew of that tariff. It was further held that the special tariff was filed without statutory authority and hence the officers were not chargeable, as a matter of law, with knowledge of it. The decision has no application whatever to the facts of this case. Lawfully published and effective commercial tariff rates available to the general public via both the Siskiyou and the Cascade Routes are the only ones presented here for consideration or mentioned in the Special Findings of Fact of the lower court. There is no special tariff rate for any purpose here involved.

In *Chicago, St. P. M. & O. Ry. Co.* v. *United States,* 217 U. S. 180, this Court held that land-grant deductions for the transportation of the mails could be made for operation over an additional track constructed on land-grant right of way. This Court held that the service that the Government reserved was coextensive with the road as constituted under the grant. There is no such set of facts here involved. As seen from previous discussion herein and the Special Findings of Fact of the lower court, the Siskiyou Route and the Cascade Route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service, etc.

Reference is made to the decision of this Court in *Chippewa Indians of Minnesota* v. *United States,* 59 Sup. Ct.

Rep. 313, apparently as reversing all previous decisions on the subject and authorizing a general use of almost any kind of information in an opinion of the Court of Claims although not of record, mentioned or referred to in the Special Findings of Fact and, in part, conflicting therewith. We do not so construe this decision. The decision simply holds, l. c. 315:

> The findings do not show as clearly as might be desired that the timber was without merchantable value in 1908. However, there is a complete absence of any controversy on this point, and appellants were not denied the right to introduce evidence to establish the value of the property. When these findings are considered with the pleadings and are clarified by the opinion of the court below, all possible doubt as to their meaning disappears, and they show that the Court found a lack of any merchantable value in 1908.

The decision has no application to the facts of this case. There is no need of resorting to the opinion of the lower court to clarify or ascertain the meaning of any of the Special Findings of Fact.

Conclusion.

It is respectfully submitted that the judgment of the Court of Claims should be reversed and the cause ordered remanded to such court, with direction to enter judgment for your petitioner, plaintiff below, in the sum of $116.31.

Respectfully submitted,

JAMES R. BELL,
Counsel for Petitioner.

APPENDIX A.

Section 5 of the Act of July 25, 1866, 14 Stat. 239, Chap. 242, as amended by the Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720, making the line of railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant line, covers the obligations of your petitioner and the rights of respondent so far as concerns the question here presented.

Section 5 of this Land-Grant Act of July 25, 1866, reads as follows:

> And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, *when required so to do by any department thereof*, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, *when so required by the government of the United States.* (Italics ours.)

Act of May 23, 1928, 45 Stat. 722-723, Chap. 720, enacted:

> That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278): *Provided*, That the Congress hereby reserves the right at any time by law to prescribe such charges at it deems advisable for such Government transportation.